2001

Regal Insurance Company v. Canal Insurance Company : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

REGAL INSURANCE COMPANY, Plaintiff / Appellee, vs. CANAL INSURANCE COMPANY, Defendant / Appellant.	Appellate Case No. 20010317 - AC District Court Civil No. 990904421 Priority Number: 15

BRIEF OF THE APPELLEE

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, SALT LAKE CITY DEPARTMENT, STATE OF UTAH
THE HONORABLE RONALD E. NEHRING, PRESIDING

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This Court has jurisdiction in this matter pursuant to § 78-2-2(3)(j), UTAH CODE ANN. (1953, as amended).

DETERMINATIVE STATUTES

The following statutes are determinative of the issues presented in this appeal:

31A-22-308. Persons covered by personal injury protection.

The following may receive benefits under personal injury protection coverage:

* * *

(3) any other natural person whose injuries arise out of an automobile accident occurring . . . while a pedestrian if he is injured in an accident occurring in Utah involving the described motor vehicle.

UTAH CODE ANN. § 31A-22-308 (1990).

31A-22-309. Limitations, exclusions, and conditions to personal injury protection.

(1) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

(a) death;

(b) dismemberment;

(c) permanent disability or permanent impairment based upon objective findings;

(d) permanent disfigurement; or

(e) medical expenses to a person in excess of $3,000.

(2) (a) Any insurer issuing personal injury protection coverage under this part may only exclude from this coverage benefits:

(i) for any injury sustained by the insured while occupying another motor vehicle owned by or furnished for the regular use of the insured or a resident family member of the insured and not insured under the policy;

(ii) for any injury sustained by any person while operating the insured motor vehicle without the express or implied consent of the insured or while not in lawful possession of the insured motor vehicle;

(iii) to any injured person, if the person's conduct contributed to his injury:

(A) by intentionally causing injury to himself; or

(B) while committing a felony;

(iv) for any injury sustained by any person arising out of the use of any motor vehicle while located for use as a residence or premises;

(v) for any injury due to war, whether or not declared, civil war, insurrection, rebellion or revolution, or to any act or condition incident to any of the foregoing; or

(vi) for any injury resulting from the radioactive, toxic, explosive, or other hazardous properties of nuclear materials.

(b) The provisions of this subsection do not limit the exclusions which may be contained in other types of coverage.

(3) The benefits payable to any injured person under Section 31A-22-307 are reduced by:

(a) any benefits which that person receives or is entitled to receive as a result of an accident covered in this code under any workers' compensation or similar

statutory plan; and

(b) any amounts which that person receives or is entitled to receive from the United States or any of its agencies because that person is on active duty in the military service.

(4) When a person injured is also an insured party under any other policy, including those policies complying with this part, primary coverage is given by the policy insuring the motor vehicle in use during the accident.

(5) (a) Payment of the benefits provided for in Section 31A-22-307 shall be made on a monthly basis as expenses are incurred.

(b) Benefits for any period are overdue if they are not paid within 30 days after the insurer receives reasonable proof of the fact and amount of expenses incurred during the period. If reasonable proof is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after that proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is also overdue if not paid within 30 days after the proof is received by the insurer.

(c) If the insurer fails to pay the expenses when due, these expenses shall bear interest at the rate of 1 1/2% per month after the due date.

(d) The person entitled to the benefits may bring an action in contract to recover the expenses plus the applicable interest. If the insurer is required by the action to pay any overdue benefits and interest, the insurer is also required to pay a reasonable attorney's fee to the claimant.

(6) Every policy providing personal injury protection coverage is subject to the following:

(a) that where the insured under the policy is or would be held legally liable for the personal injuries sustained by any person to whom benefits required under personal injury protection have been paid by another insurer, including the Workers' Compensation Fund created under Chapter 33, the insurer of the person who would be held legally liable shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and

(b) that the issue of liability for that reimbursement and its amount shall be decided by mandatory, binding arbitration between the insurers.

UTAH CODE ANN. § 31A-22-309 (2000).[1]

31A-21-106. Incorporation by reference.

(1) (a) Except as provided in Subsection (1)(b), an insurance policy may not contain any agreement or incorporate any provision not fully set forth in the policy or in an application or other document attached to and made a part of the policy at the time of its delivery, unless the policy, application, or agreement accurately reflects the terms of the incorporated agreement, provision, or attached document.

UTAH CODE ANN. § 31A-21-106 (1995).

STATEMENT OF THE CASE

1. Defendant Canal Insurance Company insured Allen Cermack d/b/a KC Trucking and his 1995 Transcraft flatbed semi-trailer.

2. The insured semi-trailer is a "motor vehicle" as defined by UTAH CODE ANN. § 41-12a-103(4)(a).

3. Plaintiff Regal Insurance Company insured Christina Chatwin.

4. On or about November 11, 1995 at or about State Street and 1200 North, Orem, Utah, Christina Chatwin was a pedestrian who was standing on the curb when

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[1] Regal has provided the text of section 309 as it exists today. Changes made since 1995 were not substantive. Canal's brief contains a typographical error incorrectly identifying this statute as section 310.

she was struck by Canal's insured semi-trailer.

5. Christina Chatwin was injured as a result of the above-described incident which "occurr[ed] in Utah [and] involv[ed] [Canal's] insured motor vehicle." UTAH CODE ANN. § 31A-22-308(3).

6. Christina Chatwin incurred medical expenses.

7. Regal paid the PIP benefits (medical expenses) to which Christina Chatwin was entitled in the sum of $3,000.00.

8. Canal, at all times material hereto, insured Christina Chatwin for PIP coverage pursuant to UTAH CODE ANN. §§ 31A-22-308(3), -309(4) because Christina Chatwin was a pedestrian who was injured in an accident involving Canal's insured motor vehicle.

9. Canal's obligation to provide PIP coverage to Christina Chatwin for the above-described accident and injuries was primary (and Regal's obligation was secondary) pursuant to UTAH CODE ANN. § 31A-22-309(4).

10. Canal was and is required to pay said PIP benefits to its insured, Christina Chatwin, within 30 days of receiving reasonable proof of the fact and amount of loss or expense incurred pursuant to UTAH CODE ANN. § 31A-22-309(5)(a).

11. Christina Chatwin provided reasonable proof of her PIP expenses to Canal, by and through her subrogee Regal, on or about July 22, 1997.

12. The district court properly ordered Canal to pay interest and attorney fees to its insured (i.e., her subrogee) because it failed and refused to pay PIP benefits when due pursuant to UTAH CODE ANN. § 31A-22-309(5)(c)-(d).

SUMMARY OF THE ARGUMENT

Christina Chatwin was injured when she was struck (as a pedestrian) by a semi-trailer insured by Canal. The district court correctly held that although owners of semi-trailers may choose to refrain from purchasing PIP coverage (i.e., opt out) pursuant to subsection 302(2), Canal's insured (i.e., the owner of the semi-trailer) purchased PIP coverage from Canal (i.e., opted in). Therefore, Canal was obligated to provide PIP benefits to Christina Chatwin. Canal's duty to provide PIP benefits to Christina Chatwin arose from the fact that Canal was paid insurance premiums. Canal claims that the obligations it undertook in exchange for the insurance premiums were limited by a definition clause which, it asserts, extinguished PIP coverage for pedestrians injured by the use of the semi-trailer.

Regal accrued to all the rights of Christina Chatwin, and Regal (hereinafter "Christina Chatwin") seeks to enforce her rights under Canal's insurance policy. Christina Chatwin does not seek to apportion fault. This is not a negligence case. This case involves a determination of insurance coverage for Christina Chatwin. Canal may not rely upon Section 309(6) simply by asserting that, under different facts

and circumstances, such section is normally applicable as between insurers while ignoring that this is a case between Christina Chatwin and her PIP carrier — Canal.

ARGUMENT

I. THE DEFINITION CLAUSE RELIED ON BY CANAL IS, AT BEST, AMBIGUOUS.

Christina Chatwin was injured when she was struck (as a pedestrian) by a semi-trailer insured by Canal, and the insured semi-trailer was a "motor vehicle" as defined by UTAH CODE ANN. § 41-12a-103(4)(a). Canal's insured was required to maintain security on the semi-trailer pursuant to UTAH CODE ANN. § 41-12a-301(2)(a). However, because the motor vehicle was a semi-trailer, Canal's insured was permitted to refrain from purchasing PIP coverage pursuant to UTAH CODE ANN. § 31A-22-302(2).

Canal claims[2] that it or its insured invoked the non-mandatory option[3] provided by Subsection 302(2). See Canal Brief at p. 10. However, Canal's insured purchased

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[2] Canal initially claimed that an exclusion contained in its liability coverage was the basis for its refusal to provide PIP coverage, but it later changed its professed justification in violation of the Doctrine of Election. See, e.g., Moore v. Energy Mut. Ins. Co., 814 P.2d 1141, 1147-48 (Utah App. 1991) ("Energy Mutual elected to flatly deny insurance coverage on the ground that contingency fee arrangements were excluded from coverage by the terms of the policy, thus waiving its right to look at the specific monetary reasonableness of the payment to the attorney.").

[3] No statute prohibits PIP coverage for semi-trailers. See, e.g., UTAH CODE ANN. § 31A-22-307(5).

PIP coverage and paid a premium to Canal in exchange for PIP coverage. It is unconscionable for Canal to collect a premium and give nothing in return. See, e.g., United States Fidelity and Guaranty Co. v. Sandt, 854 P.2d 519 (Utah 1993). Moreover, the omnibus provision of Canal's PIP endorsement belies Canal's assertions because it plainly extends coverage to pedestrians.

Canal claims that the definition of one term limits its coverage. Specifically, Canal appeals the district court's judgment by arguing that Christina Chatwin was not an "eligible injured person" because the definition of that term requires that the person's injury must have involved the "use"[4] of an "insured motor vehicle."[5] The term "insured motor vehicle" was further defined to require that the vehicle be a vehicle for which the "**named insured** [was] required to maintain security under the provisions of Title 31A, Utah Code Annotated."[6] The clauses at issue read as follows:

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[4] Canal notes in its Brief, at n. 1, that semi-trailers don't normally travel unaccompanied. Nevertheless, Canal did not utilize the words "operation of an owned automobile." It used the word "use" which includes the "use" of a semi-trailer by towing it; whereas the word "operate" might not encompass such use. More importantly, Canal's observation of policy justifications would preclude the necessity of maintaining liability coverage too. But see UTAH CODE ANN. § 31A-22-302(1).

[5] The semi-trailer was insured and designated an "owned automobile" on Canal's declarations page.

[6] The **un**annotated version of Title 31A was 236 pages long in 1997.

SECTION I

PERSONAL INJURY PROTECTION COVERAGE

The Company will pay personal injury protection benefits to or on behalf of each **eligible injured person** . . .

* * *

Definitions
When used in reference to this coverage:

* * *

"**eligible injured person**" means

* * *

(b) any other person who sustains **bodily injury** caused by an accident while:

* * *

(3) a **pedestrian** if the accident involves the use of the **insured motor vehicle**;

* * *

"**insured motor vehicle**" means a motor vehicle with respect to which

a. the bodily injury liability insurance of the policy applies and for which a specific premium is charged, and

b. the **named insured** is required to maintain security under the provisions of Title 31A, Utah Code Annotated;

* * *

If a clause in an insurance policy is ambiguous, it is construed liberally so as to promote the purposes of insurance. See United States Fidelity & Guaranty Co. v.

Sandt, 854 P.2d 519, 521-22 (Utah 1993). Insurance policies are not interpreted in favor of insurers; rather they are interpreted in favor of coverage. See, e.g., Gibbs M. Smith, Inc. v. United States Fid. & Guar. Co., 949 P.2d 337 (Utah 1997); Nielsen v. O'Reilly, 848 P.2d 664, 665 (Utah 1992); LDS Hospital v. Capitol Life Ins. Co., 765 P.2d 857, 858 (Utah 1988) ("In interpreting an insurance policy, courts have uniformly resolved ambiguities, if any there be, in a policy strictly against the insurer and in favor of the insured."). In other words, this Court must interpret Canal's insurance contract, where ambiguous, in favor of Christina Chatwin. See U.S. Fidelity & Guar. Co. v. Sandt, 854 P.2d 519, 521 (Utah 1993) (citing DiEnes v. Safeco Life Ins. Co., 442 P.2d 468, 471 (Utah 1968)). A clause may be ambiguous if it is capable of two or more plausible meanings. See First Am. Title Ins. Co. v. J.B. Ranch, 966 P.2d 834, 836-37 (Utah 1998).

The clause relied upon by Canal is ambiguous. Canal's named insured *was* required to maintain "security"[7] under Title 31A for the semi-trailer[8] even though it is

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[7] If "security" were defined as "personal injury protection," if Canal had used the words "personal injury protection," or if Canal had at least used the words "this coverage" instead of "security," Canal's argument might have had a little bit of merit. The word "security" is not defined in Canal's policy.

"When an insurance company, in drafting its policy of insurance, uses a 'slippery' word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the

true that Canal was not required to maintain each and *every* type of security under Title 31A.

It is not necessary to move beyond Section 302 of Title 31A before the ambiguity becomes clear. The semi-trailer was a vehicle for which the "**named insured** [was] required to maintain security under the provisions of Title 31A." Canal's named insured *was* required to maintain security for the semi-trailer under Subsection 302(1) of Title 31A. At the same time, Canal's named insured was not required to maintain security for the semi-trailer under Subsection 302(2) of Title 31A. Because Canal's named insured *was* "required to maintain security under . . . Title 31A" for the semi-trailer involved in Christina Chatwin's accident, she was an

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slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be found." Government Employees Ins. Co. v. Dennis, 645 P.2d 672, 675 (Utah 1982).

[8] Canal drafted its insurance policy, but it argues in its Brief, at p. 21, that it only provided PIP coverage "to the extent required by Title 31A." It did not draft its insurance policy to limit coverage "to the extent required." This Court may not violate the cardinal rule that "courts are not to infer substantive terms into the text that are not already there. Rather, the interpretation must be based on the language used, and the court has no power to rewrite the [contract] to conform to an intention not expressed." Berrett v. Purser & Edwards, 876 P.2d 367, 370 (Utah 1994); see also Averett v. Grange, 909 P.2d 246, 248 (Utah 1995) ("It is not the prerogative of the courts to rewrite contracts of parties who have conscientiously attempted to establish a particular legal relationship merely to create easy solutions to legal questions that arise long after the relationship began) (citing John Call Eng'g, Inc. v. Manti City Corp., 743 P.2d 1205, 1208 (Utah 1987) (parties should be bound by terms of contracts they voluntarily sign)).

"eligible injured person" entitled to recover PIP benefits under Canal's policy.

II. CANAL MAY NOT LIMIT ITS POLICY'S COVERAGE BY REFERENCE TO "TITLE 31A."

Canal implicitly asserts that an average insured would understand that the reference to "Title 31A" was, in fact, a reference to Chapter 22 (specifically: UTAH CODE ANN. §§ 31A-22-302, 306, 307, 308, & 309) even though Title 31A contains requirements for myriad insurance coverages. The foregoing application of the ambiguity principle (a.k.a. the doctrine of *contra proferentem*) demonstrates the reasoning behind the legislature's decision to prohibit ambiguous provisions and thereby to regulate overreaching insurers.[9]

Title 31A specifically prohibits provisions which are not set forth in the four corners of the insurance policy. Canal may not impose conditions, warranties, stipulations, representations, limitations, exceptions, exclusions, or definitions which are not contained in the insurance contract. UTAH CODE ANN. § 31A-21-106(1)(a)

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[9] "And then the office of all the judges is always to make such construction as shall suppress the mischief, advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief, . . . and to add force and life to the cure and remedy, according to the true intent of the makers of the act . . . ." Masich v. United States Smelting, Refining & Mining Co., 191 P.2d 612 (Utah 1948) (citation omitted).

(1996)[10] provides as follows:

> an insurance policy may not contain **any agreement or incorporate any provision** not fully set forth in the policy or in an application or other document attached to and made a part of the policy at the time of its delivery, unless the policy, application, or agreement accurately reflects the terms of the incorporated agreement, provision, or attached document.

Id. (emphasis added). The Utah Supreme Court has explained that the purpose of section 31A-21-106 is:

> [T]o ensure that the entire insurance contract is contained in one document so that the insured can determine from the policy exactly what coverage he or she has.

Cullum v. Farmers Insurance Exchange, 857 P.2d 922, 925 (Utah 1993); General Motors Acceptance Corp. v. Martinez, 668 P.2d 498, 501 (Utah 1983) ("The policy of the law is to prevent mistake or misunderstanding as to the terms of the insurance contract, or what in some cases may amount to sharp practice.").

In *Cullum*, the Utah Supreme Court examined an insurance contract which contained a step-down provision incorporating the limits[11] of the Utah Financial

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[10] Canal asserts that Subsection 106(1)(d)(ii) permits reference to state laws, but fails to inform the Court that this subsection was made effective May 1, 2000. The general rule followed in Utah is that "the substantive law to be applied throughout an action is the law in effect at the date the action was initiated." State v. Shipler, 869 P.2d 968, 970 (Utah Ct. App. 1994) (citations omitted).

[11] *Cullum* addressed coverage limits, but the type of provision is not relevant where the plain language of the statute expressly forbids "any agreement" or the "incorporation of any provision" not fully set forth in the policy itself.

Responsibility law by reference. The Court held that the provision violated UTAH CODE ANN. § 31A-21-106, which requires that all provisions of an insurance contract appear on the face of the policy or in an accompanying document.

Specifically, the insurance policy analyzed in *Cullum* contained a "step-down" clause that stated: "We will provide insurance for an insured person, other than you or a family member, up to the limits of the Financial Responsibility Law only." Id. at 923. The district court correctly found that the Canal policy at issue contains a clause analogous to the *Cullum* step-down clause: the clause stating that its PIP coverage only applies if "the **named insured** is required to maintain security under the provisions of Title 31A." Canal would have the Court read the "required under Title 31A" language to invoke the exception set forth in section 31A-22-302(2), thus limiting the persons covered under the PIP coverage endorsement. As in *Cullum*, this case presents an excellent example of the problem section 31A-21-106 addresses. See id. at 925. Christina Chatwin[12] could not determine, simply by reading the documents provided by Canal, who was insured under the policy. In fact, Christina Chatwin

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[12] Citizens untrained in the law must be capable of understanding what their coverage is from the four corners of the insurance policy. Judges, lawyers, and Canal's own claims adjusters are incapable of making the determination without more than "Title 31A." If this type of clause were permitted, coverage would be rendered illusory and the contracts containing them would be rendered unconscionable. And it is axiomatic that unconscionable terms in a contract are not enforceable. See, e.g., Bekins Bar V Ranch v. Huth, 664 P.2d 455, 459-62 (Utah 1983).

would have had great difficulty discovering exactly what coverage the policy provides. See id. The policy does not even specify the law to which it refers. See id.

Even if Christina Chatwin discovered section 31A-22-302, she could not possibly know from the policy's language that Canal intended to invoke the exception to section 41-12a-301(2)(a) offered by subsection (2) of section 302. Therefore, the Court must hold that under UTAH CODE ANN. § 31A-21-106(1), Canal may not incorporate any provisions in its PIP coverage endorsement not fully set forth in the policy.

III. INTER-COMPANY REIMBURSEMENT AND THE MANDATORY, BINDING ARBITRATION MECHANISM ARE DESIGNED AS A SUBSTITUTE FOR THE RIGHT OF SUBROGATION WHICH WAS EXTINGUISHED BY THE NO-FAULT STATUTE.

This case does not involve a determination of which insurance company's insured is liable (or comparatively more liable). See UTAH CODE ANN. § 31A-22-309(6)(b). This case is a coverage dispute. See Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127, 133 (Utah 1997).

The statute relied upon by Canal states as follows:

> (6) Every policy providing personal injury protection coverage is subject to the following:
>
> (a) that **where the insured under the policy is or would be held legally liable** for the personal injuries sustained by any person to

> whom benefits required under personal injury protection have been paid by another insurer, . . . , **the insurer of the person who would be held legally liable** shall reimburse the other insurer for the payment, but not in excess of the amount of damages recoverable; and
>
> (b) that **the issue of liability for** that reimbursement **and its amount** shall be decided by mandatory, binding arbitration between the insurers.

This case involves a determination of coverage obligations undertaken by two insurance companies. This case does ***not*** involve the issue of legal liability. See, e.g., Meadow Valley Contractors v. Transcontinental Ins. Co., 2001 UT App 190 at ¶¶ 12-15, 423 Utah Adv. Rep. 29 (explaining the trigger-of-coverage "arising out of" and comparing it to the trigger-of-coverage "legal liability"). It involves Canal's refusal to provide PIP benefits for its insured.

Because Canal is Christina Chatwin's insurance company, she may apply to Canal for PIP benefits and enforce all of her rights set forth in the no-fault statute. Christina Chatwin's rights are not extinguished by the fact that Regal has paid the benefits which were due her. See, e.g., State Farm Mutual Automobile Ins. Co. v. Northwestern National Ins. Co., 912 P.2d 983 (Utah 1996); see also DuBois v. Nye, 584 P.2d 823, 825 (Utah 1978) ("The collateral source rule provides that a wrongdoer is not entitled to have damages, for which he is liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an

independent collateral source.").

The right of inter-company reimbursement is not a right bestowed upon insurers by virtue of the Equitable Doctrine of Subrogation.[13] Rather, the right is a purely statutory right which is borne of the purely-statutory no-fault statute. The no-fault statute abrogated any right of subrogation between insurers by granting partial tort immunity to wrongdoers and by extinguishing the right to sue in negligence for the special damages covered by no-fault and for general damages.

If Christina Chatwin had no contractual cause of action against Canal (i.e., if her only cause of action were based on the negligence of the operator of the tractor and semi-trailer which, of course she would not possess if there were PIP coverage carried by the operator of the tractor and/or semi-trailer), then the proper venue for this

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[13] See, e.g., Bear River Mutual v. Wall, 367 Adv. Rep. 3 (Utah 1999) (clarifying that prior use of "subrogation" to mean "statutory right of reimbursement" did not limit the statutory right. The court explained: under the equitable doctrine of subrogation, an insurer seeking PIP reimbursement would "stand in the shoes" of its insured and would collect nothing because the insured's right to recover special damages is abrogated by the no-fault statute, and the tortfeasor is granted immunity — if he maintains insurance). The difference between subrogation and reimbursement is a key distinction. "While subrogation and reimbursement are similar in effect, they are different principles. With subrogation, the insurer stands in the shoes of the insured, whereas with reimbursement, the insurer has a direct right of repayment against the [torfeasor's insurer]." A. Copeland Enterprises, Inc. v. Slidell Memorial Hosp., 657 So.2d 1292, 1298 (La. 1995). An insurer whose insured is less liable than the other insurer's insured has a direct right of reimbursement against the second insurer which is "a subrogation-like right." Allstate Insurance Company v. Ivie, 606 P.2d 1197, 1201 (Utah 1980) (quoting Keeton, Robert E., Compensation Systems and Utah's No-Fault Statute, 1973 Utah L. Rev. 383, 392-93).

case would have been inter-company arbitration to determine the negligence of the motorist who "would be legally liable." However, because Christina Chatwin is legally entitled to demand coverage directly from her PIP carrier — Canal — this case is not based upon a statutory right to enter into inter-company arbitration, and Christina Chatwin (a.k.a. her subrogee Regal) "shall" recover interest and Canal "is also required" to pay attorney fees.

IV. ATTORNEY FEES AND PREJUDGMENT INTEREST ARE MANDATORY.

Attorney fees and prejudgment interest at the rate of 1½% per month are provided for in the no-fault statute. These penalty sections are mandatory in order to avoid undermining the legislative goal that PIP benefits be paid to insureds "immediate[ly] . . . without having to bring a lawsuit." Versluis v. Guaranty National Cos., 842 P.2d 865 (Utah 1992).

Because Canal refused to pay the PIP benefits it owed to Christina Chatwin in a timely manner, Canal is obligated to pay the penalties[14] set forth in the Utah Automobile No-Fault Insurance Act. See UTAH CODE ANN. §§ 31A-22-309(5)(c)-(d).

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[14] See also Sharon Steel Corp. v. Aetna Cas. & Sur. Co., 931 P.2d 127 (Utah 1997) ("Where an insurer wrongfully refuses to provide a defense, it 'is manifestly bound to reimburse its insured for the full amount of any obligation reasonably incurred by him. . . . If there be uncertainty as to the nature or extent of the services reasonably to be rendered by counsel engaged by the insured, **that uncertainty must be resolved against [the] insurer**").

Timely payment of PIP benefits, and the concomitant obligation to pay the statutory penalties, is not permissive; rather both obligations are mandatory as evidenced by the language employed by the legislature.

> (c) . . . these expenses **shall** bear interest at the rate of 1½% per month after the due date.
>
> (d) . . . the insurer **is also required** to pay a reasonable attorney's fee to the claimant.

UTAH CODE ANN. § 31A-22-309(5)(c)-(d) (emphasis added). The Utah Supreme Court has acknowledged that courts have no discretion when the legislature adopts such "mandatory" language.

> We are guided in construing the language of the instant statute by the principle that generally a direction in a statute to do an act is considered 'mandatory' when consequences are attached to the failure to act. Conversely, when a statute requires an action to be taken without prescribing a penalty for failure to so act, the requirement is not often deemed mandatory.

Stahl v. Utah Transit Auth., 618 P.2d 480, 482 (Utah 1980) (citations omitted).

V. PLAINTIFF IS ENTITLED TO RECOVER ALL ATTORNEY FEES, COSTS AND EXPENSES INCURRED ON THIS APPEAL.

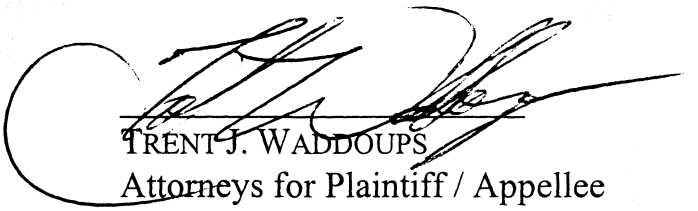
Appellate courts routinely allow attorney fees on appeal when contracts and/or statutes expressly provide for fees. See Sprouse v. Jager, 806 P.2d 219, 227 (Utah App. 1991). Plaintiff is entitled to recover its attorney fees expended for this appeal.

CONCLUSION

Plaintiff Regal was properly awarded a summary judgment regarding Canal's obligation to provide PIP benefits to Regal as the subrogee of Chrstina Chatwin. In addition, accrued interest and Regal's attorney fees were properly awarded because they are provided for in the Utah no-fault statute and are supported by admissible evidence submitted to the district court. Judgment entered against Canal should be enforced, and attorney fees incurred in connection with this appeal should be awarded.

DATED this 2 day of October, 2001.

CARR & WADDOUPS



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MAILING CERTIFICATE

I HEREBY CERTIFY that on the 2 day of October, 2001, a true and correct copy of Plaintiffs' Opposition Brief was mailed, via U.S. Mail, postage prepaid, to the following:

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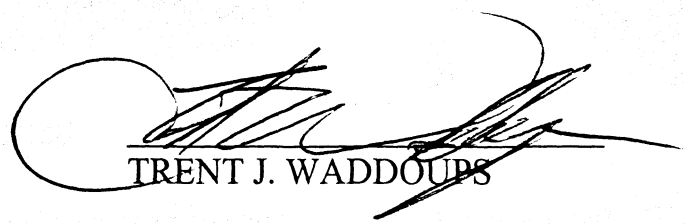

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